EXHIBIT 19

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

MDL NO. 1456

CIVIL ACTION NO. 01-12257-PBS

----------x

In re: PHARMACEUTICAL INDUSTRY

AVERAGE WHOLESALE PRICE

LITIGATION

----------x

THIS DOCUMENT RELATED TO:

United States of America ex rel.

Ven-a-Care of the Florida Keys, Inc. v.

Boehringer Ingelheim Corp. et al.,

CIVIL ACTION NO. 07-10248-PBS

----------x

CONTINUED VIDEOTAPED DEPOSITION OF:

THEODORE R. MARMOR, Ph.D. - VOLUME III

Friday, February 13, 2009

New York, New York

Reported in stenotype by:

Rich Germosen, CCR, CRCR, RPR, CRR, CLR

Page 860

A. That's my understanding.
Q. Okay.
Would you agree with me that that's a detailed definition?
A. Yes.
Q. Okay.
And it goes through various parts, right, it says it's the average unit price paid to the manufacturer for drugs in the states distributed to the retail pharmacy class of trade, right?
A. Correct.
Q. And there is terms in there that are further defined in the agreement. I'll represent that to you, the capitalized terms like covered outpatient drug is a defined term. So there is, there is detail --
A. Oh.
Q. -- in the agreement?
A. The capital, capitalized expression.
Q. Right.
A. Uh-huh.

Page 861

Q. So it tells you what drugs are covered, right?
A. It gives you certainly guidance as to which drugs are covered.
Q. Okay.
And then it tells you which prices are not included, correct? Because it said federal supply --
A. Yeah.
Q. -- schedule price, they're not included?
A. Yeah.
Q. Okay.
And then it tells you that it's supposed to be including cash discounts and other reductions in price, correct?
A. Correct.
Q. And then it tells you it's weighted average that's supposed to be calculated during a quarter under certain, pursuant to certain criteria, right?
A. Correct.
Q. And then it tells you how to deal with

Page 862

bundled sales if you have something that's a bundled sale that you need to deal with, correct?
A. I would have to see more about bundled sales to understand that, but I see the -- I see what it is that you're, you're saying.
Q. Okay.
Is it fair to say that this agreement is an authoritative statement as you might, as you would construe that term in, in your work in this case?
MS. THOMAS: Objection.
Form.
A. Well, it is a formal, formal agreement and it specifies who put the parties to the formal agreement. It leaves no doubt as to what the secretary of Health and Human Services is requesting to be done.
Q. Okay.
A. So it's a statement of AMP policy under the rebate program.
Q. So it's an authoritative statement of AMP policy under the rebate program?

Page 863

A. That's the way I would understand this absent evidence to the contrary.
Q. Okay.
So is it fair to say that when the United States government wanted to give manufacturers a directive as to the reporting of AMP, it was certainly able to do that?
A. I would put it more strongly. It did it.
Q. Okay.
So it wanted to put manufacturers on notice of the price that they were to report and they did that?
A. It's as, it's as it says.
Q. Okay.
A. I mean this is a specification of a policy.
Q. So this is the specification of the AMP policy and it tells the manufacturers what they're supposed to do in an authoritative way?
MR. GOBENA: Objection to the form.
Q. Correct?

Page 864

A. In a clear way is the way I would put it and in a way that's official and formal.
Q. Okay.
Now, in your review of the record and in preparing your report did you find a directive like this definition of AMP that called for drug manufacturers to report any other type of price?
A. Let's go through that once again. Did I -- let me just see if I can understand. You tell me whether I understand the question.
Q. Sure.
A. Did I find in other areas of pharmaceutical agreements and statements of policy as detailed and clear a statement of what the government was expecting, is that your question?
Q. Yes.
A. This is certainly at the end, at the end of the distribution of more extensive and clearer.
Q. Okay.
But did you find anything else that was on par with this?
MR. GOBENA: Objection to form.

Page 865

A. I didn't ask that question so I don't know off the top of my head that I -- I think I feel more comfortable just saying that I know what the other standards were and they were more flexible than this. This is more specified in detail.
Q. Well, what are the other standards that you're referring to?
A. Ones like estimated acquisition cost. Taking into account questions about what -- whether or not this ought to be net of discounts.
Q. You mean estimated acquisition costs?
A. Whether estimated acquisition costs should be net of discounts that your estimation process.
Q. Let me just -- I don't mean to cut off your answer, but I just want to stop you because I'm talking about prices that the government directed manufacturers to report specifically.
A. Oh, excuse me.
No, this is actually the only example I know of the Medicare/Medicaid officials directly

Page 866

telling the manufacturers what price to provide them for purposes of a rebate or anything else. The other were directed to the carriers and to the state governments.
Q. Okay.
So this -- as far as you know this is the only statement of policy by the United States Government to manufacturers that they should report a price within specific guidelines?
A. There may be others. I just am not aware of it. I'm aware of what the government policies, official and public policies were and they were directed to, to other actors, but I believe they were directed to other actors in the assumption that the manufacturers would provide data on their prices to satisfy the estimated acquisition cost standard.
Q. Okay.
Was this when you were talking -- I think it might have been when Mr. Berlin was asking his questions when you said that the OIG reports and the other publications of HCFA or CMS

Page 867

should have indicated to manufacturers what their AWP reporting should have been?
A. I think --
MR. GOBENA: Objection to form.
A. My understanding of the realities of American commerce and politics is that when -- I think I said that, something along those lines, yes.
Q. Well, there is nowhere -- there is no evidence you can point to, is there, that the government directed to manufacturers or indicated to manufacturers a definition or a methodology of coming to AWP that meets the same level of detail as this definition of average manufacturers price?
A. Well, the same level of detail. I mean when -- oh, you mean how to do AWP as opposed to how to discount it?
Q. Right.
A. Yeah. No, I think this is more explicit, but that's perfectly consistent with the, with my understanding of the flexibility given to states about --

Page 872

prices into the system of reimbursement, but whether they were required to do that is different from whether they would be expected to do that in order to be reimbursed.
Q. Okay.
So are you saying there might have been a practical reality that you needed to have a price so that there could be -- so the billing system would work, but there is no official policy requiring that they report any particular price?
A. Any particular --
MS. THOMAS: Objection.
A. Yeah, any particular price, no. That they conform to the expectations surrounding this policy, yes.
Q. In your opinion --
Strike that.
How does your opinion of what AWP should have represented differ from what AMP is defined as in the rebate agreement?
MR. GOBENA: Objection.
MS. THOMAS: Objection.

Page 873

Form.
A. The difference I see is along the lines we've just been discussing. This is explicit. It's clearly what's required and it produces a number coming from each quarter from manufacturers if it's complied with, whereas I think the AWP and the WAC and the various standards of lower of is less, less specified as to what the price that will be reimbursed will be because it gives the states or the carrier some degree of discretion about which ones to use and how.
Q. If manufacturers had reported their AMP -- or let me say this carefully.
If what manufacturers reported as their AWP was the AMP or met the AMP definition, would that be sufficient in your view?
MS. THOMAS: Objection.
Form.
A. Sufficient for what?
Q. Well, in other words --
A. Just only my simple question is sufficient for what purpose? If you meant by that

Page 874

one purpose would be to lower the estimated acquisition cost the answer would be yes.
Q. Would it have met the standard that the government was setting in your view in the reports it issued that you say the manufacturers should have been aware of?
MR. GOBENA: Objection to form.
A. It certainly would have been a candidate for satisfying that condition because it would have been closer to the actual acquisition costs and closer to then the estimated acquisition cost.
Q. Now, the -- is it your --
Well, strike that.
Do you understand that the AMP numbers were reported to HCFA that later CMS on a quarterly basis by manufacturers?
A. That certainly is what the policy called for and I would expect, but don't know that that's what was done.
Q. Okay.
If that policy had been followed, is it fair to say that CMS or HCFA depending on the

Page 875

relevant period would have had the AMPs of the manufacturers for each of the drugs?
MR. GOBENA: Objection to form.
Q. Doesn't that follow logically?
MR. GOBENA: Same objection.
A. Well, it's interesting. I'm a little bewildered here about this. I think it follows logically that if they had accurate representations of the average manufacturer prices they would know what the average prices were as --
COURT REPORTER: I can't understand what you're saying.
A. If HCFA or CMS were provided accurate representations of average manufacturer prices as defined here, they would necessarily know the answer to the question of what was reported as average management, average manufacturers price.
What they wouldn't know is whether or not it was accurate.
Q. But putting aside whether it was accurate, the procedure called for by the agreement was that you would report the AMPs on a